

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

RAMONA A. ROWLEY

Claimant

VS.

LOVE'S TRAVEL STOPS & COUNTRY STORES, INC.)

Respondent

AND

AMERICAN HOME ASSURANCE COMPANY

Insurance Carrier

Docket No. 1,036,384

ORDER

Respondent appeals the July 25, 2008 preliminary hearing Order of Administrative Law Judge Nelsonna Potts Barnes (ALJ). Claimant was awarded treatment to her bilateral lower extremities with Dr. Steven Howell as the authorized treating physician. Respondent was also ordered to provide claimant with a list of three physicians from which claimant was to choose the authorized treating physician for her low back symptoms. The ALJ determined that claimant had aggravated her low back due to an abnormal gait caused by the injury and subsequent treatment to her right lower extremity.

Claimant appeared by her attorney, Phillip B. Slape of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Jon E. Newman of Wichita, Kansas.

This Appeals Board Member adopts the same stipulations as the ALJ, and has considered the same record as did the ALJ, consisting of the transcript of the Discovery Deposition of Ramona Rowley dated May 16, 2008, with attachments; the transcript of the Preliminary Hearing held July 24, 2008, with attachments; and the documents filed of record in this matter.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of her employment with respondent, with alleged injuries to her back and/or left lower extremity? Respondent acknowledges that claimant suffered an injury to her right lower extremity on

May 12, 2006 when she missed a step as she was descending a ladder after changing gas prices on a convenience store sign. Respondent disputes whether claimant then aggravated her low back and left lower extremity as the result of this original injury, the subsequent treatment for that injury, and an antalgic gait that developed due to the injury and ongoing difficulties with her right lower extremity.

2. Are the claimant's alleged symptoms and/or need for treatment to her back and/or left lower extremity the natural and probable consequence of her preexisting conditions and/or some other non-occupational cause and not causally related to her work accident? Claimant has a long history of treatments, both with medical doctors and chiropractors, for difficulties with her low back and lower extremities. Respondent alleges her ongoing symptoms are the natural consequence of these preexisting conditions. Claimant argues that her preexisting problems were aggravated by her injury to her right lower extremity and the need for long-term use of CAM walkers and casts on her right leg. Additionally, claimant developed an antalgic gait from both the right lower extremity injury and subsequent treatment.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant has worked as a convenience store manager for several companies. She began working in that capacity for respondent on December 28, 2004. On May 12, 2006 claimant climbed a ladder to change the prices on a gas sign. While descending from the ladder, claimant missed one or two steps, landing on her right foot. Claimant had immediate pain in her right foot, ankle and heel.

Claimant first sought treatment at the William Newton Memorial Hospital emergency room in Winfield, Kansas on May 15, 2006. X-rays were taken and claimant was diagnosed with a possible fractured heel and torn ligaments. Claimant then came under the care of her primary care physician, John M. Winblad, M.D. Dr. Winblad put claimant in a CAM walker and ordered physical therapy. Claimant's condition did not improve and, after referrals to several doctors, she came under the care of orthopedic foot and ankle specialist Steven Howell, M.D.

Dr. Howell first examined claimant for this injury on October 10, 2006. At that time he diagnosed claimant with a probable posterior tibial tendon dysfunction, right foot with

an Achilles contracture. (P.H. Trans., Resp. Ex. 1.) Claimant was initially treated conservatively, with CAM walkers, SMO braces and physical therapy. An MRI on June 18, 2007 revealed a partial tear of the posterior tibial tendon at its insertion. Surgery was performed on July 20, 2007 with a follow-up surgery on February 25, 2008 to remove screws from the posterolateral right heel. Additionally, claimant testified she had surgery to remove hardware in her foot two weeks before the July 24, 2008 preliminary hearing. Claimant testified that low back and left leg problems began after the first surgery.

Claimant was referred to physical medicine and rehabilitation specialist Michael H. Munhall, M.D. by her attorney on May 13, 2008. Claimant was diagnosed with right posterior tibial tendon tear and repair; right heel spur, excised; right plantar fasciitis; low back pain; left lateral ankle pain and left knee pain. Dr. Munhall was provided a history of claimant's injuries and medical history. After examining claimant and reviewing extensive medical reports, Dr. Munhall came to the conclusion that claimant had suffered a right foot and ankle injury on May 12, 2006 and developed low back, left foot and ankle, and left knee problems as a result of the initial injury and the subsequent treatment and antalgic gait development. He found the treatment provided by Dr. Howell to be excellent and recommended ongoing treatment for claimant's lower extremities. He also recommended treatment for claimant's low back.

Claimant was referred by respondent to board-certified neurological surgeon Paul S. Stein, M.D. for an examination on June 30, 2008. Dr. Stein also was provided the medical treatment file on claimant, noting in his report the receipt of 275 pages of medical records. Dr. Stein's report discusses claimant's injury and treatment history in detail. Respondent contends that claimant's ongoing difficulties in her left leg and low back are the result of long-standing, preexisting conditions. Dr. Stein's report provides support for respondent's contentions. Claimant has been receiving medical and chiropractic treatment for ongoing lower extremity, low back, neck and shoulder problems from as early as 1989. Her treatment with Wayne A. Brooks, D.C. of Brooks Chiropractic spans over 15 years. Claimant has been treated by Dr. Brooks multiple times for a myriad of conditions. From 1991 through the end of 2005, claimant was treated by Dr. Brooks a total of 162 times for everything from headaches to neck pain, bilateral shoulder pain, upper back pain, low back pain, hip pain and burning and soreness in her feet. While this appears to be an extensive course of treatment, it only averages to 10.8 visits per year, or less than once per month.

Dr. Stein was asked to evaluate the connection between claimant's low back and leg symptoms and the injury suffered on May 12, 2006, and as they may relate to claimant's antalgic gait and subsequent treatment for her right lower extremity injury. Dr. Stein opined that claimant's low back symptoms are a natural and probable consequence of the preexisting symptomatology with an increase in subjective symptoms from the altered gait. He also found her body habitus is a significant aggravating factor. At the time of Dr. Stein's examination, claimant was 5 feet 3 inches tall and weighed 250 pounds. Dr. Munhall weighed claimant at 266 pounds. Both doctors found claimant to be morbidly obese and Dr. Stein determined a connection existed between claimant's

symptoms and her weight. While Dr. Stein pointed directly to claimant's past medical problems as the cause of her ongoing problems, he also recognized a connection between the injury of May 12, 2006, claimant's antalgic gait and the increase in symptoms in claimant's low back. Dr. Stein did not render an opinion on claimant's left lower extremity even though his report noted pain from her low back extending into her left thigh and numbness and tingling in the left ankle. Under the Current Status section of his report he also noted complaints by claimant of radiating pain down her left lateral thigh into the left calf. However, his antalgic gait opinion relates only to the back.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

¹ K.S.A. 44-501 and K.S.A. 2005 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.⁵

When a primary injury under the Workers Compensation Act arises out of and in the course of a worker's employment, every natural consequence that flows from that injury is compensable if it is a direct and natural result of the primary injury.⁶

Here, claimant suffered a work-related injury to her right lower extremity when she misstepped while descending a ladder. That initial injury was treated over a long period of time, with claimant undergoing as many as three surgeries. Additionally, ongoing physical therapy and the use of CAM walkers and the development of an antalgic gait led to added problems with claimant's back and left lower extremity. While Dr. Stein is not fully supportive regarding the connection between the antalgic gait and the development of the left leg and low back problems, he does acknowledge an increase in symptoms as a result. Dr. Munhall, on the other hand, is specific in connecting the right leg antalgic gait and the later development of the left leg and low back problems. These opinions, coupled with claimant's testimony, are enough to convince this Board Member, at least for preliminary purposes, that claimant's left leg and low back symptoms are at least partially related to the right foot and ankle injury and subsequent antalgic gait. This Board Member recognizes claimant's long history of problems, claimant's obesity and the numerous entries in medical reports that fail to identify the left leg and low back as problems. But, with the opinions of Dr. Stein and Dr. Munhall, claimant has carried her burden in this matter. The preliminary hearing Order of the ALJ is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has carried her burden of proof that she has suffered at least temporary aggravations to her low back and left lower extremity as the result of an antalgic gait that

⁵ *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

⁶ *Gillig v. Cities Service Gas Co.*, 222 Kan. 369, 564 P.2d 548 (1977).

⁷ K.S.A. 44-534a.

developed after suffering an injury to her right lower extremity and the subsequent treatment required for same. The preliminary hearing Order of the ALJ should be and is hereby affirmed.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated July 25, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of October, 2008.

HONORABLE GARY M. KORTE

c: Phillip B. Slape, Attorney for Claimant
 Jon E. Newman, Attorney for Respondent and its Insurance Carrier
 Nelsonna Potts Barnes, Administrative Law Judge